Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2003

DAVID YOUNG
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA
WHICH DENIED ALLOWANCE OF APPEAL
FROM THE MEMORANDUM OPINION OF THE
SUPERIOR COURT OF PENNSYLVANIA

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64 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT ERRED IN FAILING TO SUPPRESS EVIDENCE SEIZED PURSUANT TO A SEARCH RENDERED UNCONSTITUTIONAL DUE TO THE DEFECTIVE EXECUTION OF A SEARCH WARRANT IN THE EARLY MORNING HOURS AND WHETHER THE PENNSYLVANIA SUPERIOR COURT ERRED IN FAILING TO CONSIDER CERTAIN FACTORS ROUTINELY CONSIDERED BY OTHER FEDERAL AND STATE APPELLATE COURTS?

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS IN THE COURTS BELOW

On July 10, 2003, the Pennsylvania Supreme Court declined to accept jurisdiction of this matter. Said unpublished Order is reproduced at Appendix A, infra, at A-1. The Superior Court's unpublished Memorandum Opinion is reproduced at Appendix B, infra. The Opinion of the Honorable Anthony J. DeFino, the trial Court, is reproduced at Appendix C, infra.

CONCISE STATEMENT OF BASIS OF JURISDICTION IN THIS COURT

This Petition is from the Order of the Pennsylvania Supreme Court on July 10, 2003 denying the Petition for Allowance of Appeal. This Court's jurisdiction is invoked under 28

U.S.C. §1254 (1).

THE CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Fourth Amendment to the United States Constitution states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.....

CONCISE STATEMENT OF THE CASE

The present appeal was initiated by the filing of a motion to suppress physical evidence seized during the search of the Petitioner's premises at 6546 16th Street in Philadelphia on March 26, 1999. The motion was litigated prior

to a bench trial before the Honorable Anthony J. DeFino in the Philadelphia Court of Common Pleas and denied. Petitioner was subsequently tried and found guilty of the charges of possession with intent to distribute a controlled substance and criminal conspiracy. He received a sentence of seven to fourteen years.

Critical to the conviction in this case was a search of Petitioner's premises by the Philadelphia Police. The motion to suppress physical evidence in part raised the issue of the improper execution of the search in violation of the knock-and-announce doctrine. Said motion was raised pursuant to the Fourth Amendment as well as the codification of that doctrine under Pennsylvania Rule of Criminal Procedure 2007. That portion of the motion sought to suppress the evidence on two grounds: 1) the failure of

the police to knock-and-announce at all, and 2) the failure of the police to wait an appropriate period of time for Petitioner to surrender his premises to them. After a hearing on this matter, Judge DeFino credited the testimony of the police and found that their actions had passed constitutional muster under both prongs of the motion.

The only contention involving the execution raised in the Pennsylvania Superior Court was the police failure to wait a reasonable period of time after knocking and announcing their identity, authority and purpose before forcing the door. The trial Court had found that the Commonwealth had waited a reasonable period of time prior to entry based on the testimony of Sergeant Steven Powell who testified that he and numerous other officers approached the

property, located at 6546 16th Street in Philadelphia before 6:00 a.m., at which time the police knocked on the door to the residence. They announced "police - search warrant" in a loud voice and waited seven to ten seconds for a response. They then knocked a second time, waited fifteen to twenty seconds and then forced open the door with a battering ram after receiving no response and hearing no noise from the property. Superior Court Opinion at Appendix B20-22. In sum, Sergeant Powell testified that the total amount of time the police probably waited prior to breaching the door was between twenty-two and thirty seconds.

The Pennsylvania Superior Court affirmed the conviction on December 13, 2002, and after a timely Petition for Allowance of Appeal was

filed by Petitioner in the Pennsylvania Supreme Court, that Court denied that Petition on July 10, 2003.

CONCISE STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

This Petition raises the question of whether the common law knock and announce principle was violated in this case and, more importantly, whether the Courts of this country require direction from this Honorable Court in determining the so-called timing issue, the period of time within which it is reasonable to delay between the knock and announcement of the police identity, purpose and authority and the forced entry into a premises to be searched

via the authority of a search warrant. It is respectfully submitted that the Courts of this country have such differing definitions of what is reasonable under these circumstances that this Honorable Court should grant the instant writ of certiorari to provide guidance in this area.

While some Courts, as discussed below, have held that a mere six (6) seconds is a sufficient period of time to constitute a constructive refusal before the police are permitted to break open one's front door, it is respectfully submitted that such brief period of time trivializes the now ancient common law knock-and-announce rule. Indeed, Sir Edward Coke stated in 1644 that a "man's house is his castle" and William Pitt, the renowned British Prime Minister, repeated these sentiments in a

speech before Parliament when he stated that even the poorest person in the most ruined tenement could exclude the "forces of the Crown". See, Miller v. United States, 357 U.S. 301, 307 & n.7 (1958).

Thus, in Wilson v. Arkansas, 514 U.S. 927 (1995), this Court lent its voice to Coke and Pitt and countless Courts of this (and other) land(s), which had included the common law knock-and-announce doctrine in its precedents by holding that this doctrine forms part of the Fourth Amendment reasonableness inquiry. In that Opinion the Court left "to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable

under the Fourth Amendment." Id. at 936.[1]

However, what has emerged is a hodgepodge of rulings depending upon the predilection of the particular Court. In this case, the Pennsylvania Courts permitted an early morning forced entry, which was estimated to have taken as little as 20 seconds. Many Courts have found this, and even shorter, periods of time to be sufficient. For example, in United States v. Gatewood, 60 F.3d 248 (6th Cir. 1995), the Court held that a wait of a mere ten (10) seconds was a reasonable period of time to wait before forcing entry. Similarly, the Court in

[1] That this Court has left no doubt that the knock-and-announce doctrine protects the highest and most sacred privacy rights is confirmed in the number of cases involving this right since Wilson. See, Richards v. Wisconsin, 520 U.S. 385 (1997); United States v. Ramirez, 523 U.S. 65 (1998); and Illinois v. McArthur, 531 U.S. 326 (2001).

State v. Crannell, 170 Vt. 387, 750 A.2d 1002 (2000) held that the same 10-second wait was sufficient, especially since the police heard "rustling" noises.

In State v. Huff, 69 Conn. App. 51, 793 A.2d 1190 (2002), the Connecticut high Court held a seven (7) second period acceptable because there were possibly guns and drugs in the house although there was no evidence that the police were in danger or that the evidence was being destroyed. Cf., State v. Monay, 85 Hawai'i 282, 943 P.2d 908 (1997) (Hawai'i Supreme Court held that delay of mere two (2) seconds insufficient and mere fact that drugs are in the house without showing of any other facts is insufficient basis for virtually simultaneous knock and announcement and

entry); State v. Herrick, 1997 ND 155, 567 NW2d 336 (1997)(North Dakota Supreme Court held that three (3) second delay based on same alleged exigency without any other evidence insufficient); see also, United States v. Dice, 200 F.3d 978 (6th Circuit 2000) (where agents waited a "few' seconds after knocking and announcing, the government concedes that fact that drugs in house does not meet one of the exceptions to knock-and-announce rule).

In United States v. Jones, 133 F.3d 358 (5th Cir. 1998), the Court noted that there is generally no violation of the knock and announce statute when the police have waited more than 5 seconds and concludes with a blanket rule that "15 to 20 seconds is certainly long enough" in drug cases. In State v.

Williams, 800 So. 2d 819, 826 (La. 2001), the Louisiana Supreme Court held that the police acted reasonably in waiting fifteen seconds "well above the five second threshold that courts have generally employed." See also, United States v. Spriggs, 996 F.3d 320 (D.C. Cir. 1993)(fifteen second wait sufficient).

By the same token, in United States v. Markling, 7 F.3d 1309 (7th Cir. 1993), the Court held that there was a constructive denial of entry when the officers waited a mere 7 seconds prior to knocking the door down. In United States v. Garcia, 983 F.2d 1160 (1st Cir. 1993), the Court rationalized the entry into a home in ten (10) seconds where the search was for drugs that could be easily destroyed even though there was no evidence that anyone

was attempting to destroy those substances. Cf. United States v. Moore, 956 F.2d 843, 850 (8th Cir. 1992) (blanket rule permitting no-knock search warrants in all drug case, regardless of whether forms and quantities suspected to be present can be readily destroyed, patently unjustifiable); United States v. Jenkins, 175 F.3d 1208, 1214 (10th Cir. 1999) (blanket policy permitting breaking down of door after only ten seconds would not comport with existing Supreme Court and circuit precedent).

The Jenkins case is significant in that the testimony of two police officers reflected that in the experience of one of the officers the occupants had never reached the door, before it was forced, while he was in the process of

executing over fifty (50) search warrants. The second officer stated that only two (2) occupants had ever reached the door, before it was forced, while he was in the process of executing over fifty (50) search warrants. Nonetheless, the Court found that the wait of 14-20 seconds was sufficient to pass muster, particularly since this was a daytime search.

By contrast, there are a number of decisions both pre and post-dating Wilson, which appear to severely contradict the authority set forth above. In Griffin v. United States, 618 A.2d 114 (D.C. Cir. 1992), the Court undertook a searching analysis of the knock-and-announce rule, with emphasis on those searches, such as the search in the matter at bar, which occur during the middle of the night. The Court held that a wait of thirty

seconds, the same time as in this case, was not legally sufficient. The Court, like the Court in Jenkins, addressed several factors beginning with the time of day the search was executed.

It took judicial notice that most people are asleep in the middle of the night; unable to think clearly upon being awakened and may take some time to awaken; must then think about what they are hearing, if indeed they can hear the police, yelling "police, search warrant" because of the location of the bedroom; are inappropriately dressed to answer the door and must take time to dress; and are awakened in circumstances that "are not likely to be conducive to rational analysis or provident decision-making." Id. at 121.

Moreover, in that case, the police did not see lights on, hear a television or radio, or

footsteps. There was absolutely no suspicious activity at all. In this case, the police also heard no activity in the house which would alert them to the fact that evidence was being destroyed or that they were in danger.

Thus, when considering these various factors, the Griffin Court held that the wait of thirty (30) seconds was not sufficient to permit a person to peaceably surrender their premises. See also, Poole v. United States, 630 A.2d 1109, 1117-18 (DC App 1993) (same reasoning applied to search at 8:15 a.m. on a Saturday morning).

In United States v. Leichtnam, 948 F.2d 370 (7th Cir. 1991), another case where the entry occurred at 6:00 a.m., the Court held that the police use of a battering ram was reasonable where the entry occurred between

one and two minutes after the police began to knock and announce. There, the police not only knocked and announced, but pried the screen door open and then knocked and announced again at the front door several times before forcing the door. See also, United States v. Viale, 312 F.2d 595, 602, cert. denied, 373 U.S. 903 (1963) (delay of one to two minutes reasonable period of time).

In United States v. Goodson, 165 F.3d 610 (8th Cir. 1999), the Court found that a nighttime search was executed in a reasonable fashion when the police waited twenty (20) seconds because of the size of the house, which was a one-story ranch house, the potential that drugs could be flushed down the toilet, and the fact that the defendant had a history of assaultive behavior with a deadly weapon, and

the police feared that a longer wait could jeopardize their safety. None of these factors were discussed or present in the case at bar, and the police specifically testified that there was no evidence that the evidence was being destroyed.

In United States v. Spikes, 158 F.3d 913, 927 (6th Cir.), cert denied, 525 U.S. 1086 (1999), the Court also noted that when officers serve a warrant in the nighttime, the period the officers should wait increases. However, in that case, the Court found a 15-30 second period to be sufficient.

In United States v. Banks, 282 F.3d 699 (9th Cir. 2002), the Court held that the lapse of fifteen (15) to twenty (20) seconds was an insufficient period of time to wait before forcing entry to search for drugs. The Court set

forth a list of non-exhaustive factors to be utilized, which included, but was not limited to, the size and location of the residence; the location of the officers in relation to the main living or sleeping quarters of the residence; the time of day; the nature of the suspected offense; the evidence supporting the suspect's guilt; the suspect's prior offense of conviction, if any; and any other evidence observed by the police that would reasonably lead them to believe that immediate entry was required.

In that case, the police provided no testimony that would lead them to believe that the evidence was being destroyed or that they were in any type of emergency situation, which required their immediate entry. In fact, in that case, the officers found Banks emerging from a shower, wet, naked, soapy and obviously

concerned that his home was being invaded. Accordingly, the Court held that the period of time involved was not sufficient to satisfy the reasonableness inquiry of the Fourth Amendment.

In United States v. Andrus, 775 F.2d 825 (7th Cir. 1985), the Court found that where the police knocked three (3) times at 9:45 p.m., the lights were on in the house, and they waited more than thirty-five seconds, this was a reasonable period of time to wait before forcing entry. Under similar circumstances, the Court held that a forty-five second wait was reasonable in United States v. Owens, 788 A.2d 570 (D.C. App. 2002)

Finally, in United States v. Gallegos, 314 F.3d 456 (10th Cir. 2002), the Court had the opportunity to address a search at 4:00

a.m. The District Court found no exigent circumstances. In determining whether the occupants of the residence had a reasonable opportunity to surrender the premises, the Tenth Circuit considered several factors: the time of day; the absence of any indication of activity in the house; and the known upstairs location of the bedrooms. It was also dark outside and there were no lights on in the house; there was no evidence that any of the occupants were awake and about at that time; and the evidence supported the conclusion that the occupants were asleep. Moreover, the police were aware that the bedrooms were on the second floor, which as the Court noted, would lengthen the time needed to reach the front door as opposed to when the occupants are on the ground floor. Given these factors the brief

wait was held to be woefully inadequate to permit the occupants to respond to the knocking of the police.

Professor LaFave has criticized the Courts which have regularly approved ten or twenty second waits and opines

> that courts have been unduly lenient on this score....Even more remarkable is the fact such brief periods of waiting have been deemed sufficient when it was apparent the police must have known that the occupant could not possibly have answered the door in the time which had passed. These latter decisions are clearly incorrect, for whether there has yet occurred a "constructive refusal" should be determined only by taking into account the circumstances of the particular case.

W. LaFave, Search and Seizure, 3d. Ed. (1996), §4.8(c) at pp. 608-609.

In Petitioner's case, the Pennsylvania Superior Court failed to consider any of the circumstances that Griffin, Goodson, Banks, Spikes, Gallegos, Jenkins and Professor LaFave suggest control this inquiry. Rather, that Court, like so many of the other Courts mentioned above, merely fixated on one factor which justified brief periods of waiting before forcing open the door. Thus, in some jurisdictions, merely raising the specter of guns and drugs will justify the briefest of waiting periods, such as five seconds. It is respectfully submitted that these rationalizations trivialize the important and practical privacy rights attendant to the execution of a search. Moreover, the authority is often in contravention to this Court's pronouncement in Richards v. Wisconsin, 520 U.S. 385 (1997).

Hence, it is abundantly clear that there are deep divisions between numerous Courts of Appeals and State Courts on how the execution issue should be determined.

CONCLUSION

Accordingly, for all the foregoing reasons, it is respectfully submitted that this Honorable Court should grant a Writ of Certiorari in this matter.

Respectfully submitted,

Gerald A. Stein

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PA.: NO. 20 EAL 2003
Respondent :
v. :
DAVID YOUNG :
Petitioner

ORDER

PER CURIAM

AND NOW, this 10th day of July, 2003, the Petition for Allowance of Appeal is hereby Denied.

IN THE SUPERIOR COURT
OF PENNSYLVANIA

COMMONWEALTH OF PA. : No. 1470 EDA 2001
v. :
DAVID YOUNG, :
Appellant :

Appeal from the Judgment of Sentence entered May 15, 2001, In the Court of Common Pleas of Philadelphia County, Criminal, No. 9912-0843

BEFORE: McEWEN, P.J.E., FORD ELLIOTT, and POPOVICH, JJ.

MEMORANDUM: FILED DECEMBER 13, 2002

Appellant, David Young, has taken this direct appeal from the judgment of sentence to serve a term of imprisonment of from seven years to fourteen years, imposed after he was found guilty by the trial judge of the offenses of possession and possession with intent to deliver, and criminal conspiracy. We affirm.

The facts underlying the instant appeal arise from an extensive undercover surveillance investigation by the Philadelphia Police narcotics squad between October, 1998 and March, 1999, of numerous Philadelphia properties, namely, 1425, 1433, 1434, 1435 West Cambridge Street (hereinafter "1425", "1433", "1434" and "1435") and 6546 North 16th Street. The targets of the investigation included, among others, appellant and his cohort, Henry Maiden. As a result of this investigation. Officer Bethea prepared a search warrant for 6546 North 16th Street which was supported by a 33-page affidavit of probable cause.

The affidavit included information, received from a confidential informant, that appellant was a supplier of narcotics to other individuals, including Henry Maiden, on the 1400

block of West Cambridge Street. The confidential informant stated that he had personally purchased ounce quantities of crack cocaine from appellant, and had observed appellant giving crack cocaine to Maiden as recently as February, 1999. The informant stated that defendant used his food vending truck on 400 North Broad Street to launder his drug money, and that he knew that appellant met with drug dealers, including Maiden, at his mother's house at 2612 North Myrtlewood Street. Officer Bethea stated in his affidavit that this informant had provided reliable information in the past which had led to the arrests and seizure of narcotics in eight cases over a two year period. In addition, the affidavit of probable cause set forth independent police observations, which included the following dates:

October 29, 1998 - Officer Bethea observes appellant with Maiden and another man at the home of appellant's mother at 2612 North Myrtlewood Street.

October 30, 1998 - Officer Bethea, at approximately 7 p.m., observes appellant leave 6546 N. 16th Street, travel to the 1400 block of West Cambridge Street, and continue to the 1900 block of Ingersoll, where he is seen passing a black wrapped packet to a black male and receiving a roll of money in return. A second male approaches and gives appellant of cash.

October 30, 1998 - Police officers establish surveillance on the 1400 block of Cambridge Street and observe appellant's automobile being driven by Henry Maiden who enters 1434. Another vehicle later double-parks beside appellant's vehicle and the operator blows his horn several times. A black male exits 1434, takes a package from the operator

of this vehicle, places it inside the trunk of appellant's automobile, and returns inside 1434.

November 10, 1998 - Police, at approximately 6:30 p.m., observe appellant working at his food vending truck at 400 North Broad Street. A jeep pulls up to the rear of the vehicle and two black males exit the vehicle. One of the males removes a white plastic bag from the rear of the jeep and passes it to the rear of the food truck where it is received by a pair of hands. Appellant drives the food truck back to 6546 N. 16th Street, parks it in the rear of the house, and unloads items into the garage.

January 20, 1999 - Appellant exits 1434 and approaches Officer Vida Butler, an officer who is part of the surveillance team and who is sitting in an unmarked car in the 1400 block of West Cambridge Street, and questions her about her presence on the block.

January 21, 1999 - Appellant is observed leaving 6546 North 16th Street at 9:55 p.m. and driving to the 1400 block of West Cambridge, where he enters and exits 1433 and 1434 several times. At the same time, numerous other people are entering 1433, staying a short period, and exiting. Some are seen counting money or small objects as they leave.

February 5, 1999 - Police Officers Schmidheiser observes many people going in and out of 1434. An adult black male is observed conducting sales along 15th and Cambridge Street. He was observed at 1434 West Cambridge Street by these officers.

February 8, 1999 - Police observe appellant leave 6546 North 16th Street at 7:50 p.m. and Officer Bethea observes appellant enter 1434. He remains there for twenty minutes, and

then drives away.

February 9, 1999 - Officers Mark Schmidheister, stationed at the 1400 block of West Cambridge Street, observes foot traffic in and out of 1434. He observes Henry Maiden exit 1425 with a canvas bag which he hands to the light skinned adult male walking with him. Together they enter 1434. Moments later. Officer Amy Gaymon is assaulted inside 1434 while attempting to make an undercover purchase of cocaine. Thereafter, Officer Bethea observes that the license plate on appellant's oldsmobile has been changed.

March 2, 1999 - Officer Bethea observes appellant and Maiden entering and exiting 1433 and 1435 several times. He observes ongoing foot traffic at the same time.

March 4, 1999 - Appellant drives to the 6546 North 16th Street in his food truck, and then

to the 1400 block of West Cambridge Street in his Oldsmobile. Officer Bethea observes him exit 1434, and then leave the area. At that time the police surveillance vehicle is struck with an object while parked on 15th and Cambridge Streets.

March 18, 1999 - Police Officer Bethea observes a black female, later identified as Miriam Sanders, accepting money in exchange for small objects in the 1400 block of West Cambridge Street. Present during some of these sales was Henry Maiden. At 1:07 p.m., Maiden was seen entering 1425 and exiting at 1:09 p.m. with a baggie containing numerous small objects, which he handed to Sanders. Officer Bethea then enlisted a confidential informant who approached Maiden and Saunders and made a controlled buy of two yellow packets of crack cocaine from Sanders. Police Officer Dawn Bullock arrested Sanders

> and recovered a purse containing two packets of crack cocaine matching those purchased by the informant.

On March 26, 1999, police executed the search warrant at 6546 North 16th Street, and arrested appellant inside the residence. At this address police recovered a cloth bag in the garage containing 125 grams of cocaine, two baggies containing 12 grams and 11 grams respectively of crack cocaine from the living room, baggies containing bulk and packaged marijuana, and a bullet-proof vest. Appellant was found with $578 on his person and an additional $4,990 was found beneath a mattress. Several document addressed to appellant were also recovered.

Police also simultaneously executed a search warrant at 1425 West Cambridge Street

and recovered a knotted baggie containing 52 black packets of crack cocaine weighing 3.9 grams, loaded guns and ammunition, $725 in cash, and drug packaging paraphernalia.

On January 11, 2001, the trial court, sitting without a jury, found appellant guilty of the aforementioned crimes, and, on May 14, 2001, appellant was sentenced to serve a mandatory term of imprisonment of from seven years to fourteen years. This timely appeal followed.

Appellant, in the brief he has presented to this Court, raises three questions:

> Whether the court erred in denying appellant's motion to suppress evidence where the four corners of the warrant failed to present sufficient evidence to establish probable cause?
>
> Whether the trial court erred in

> failing to suppress evidence seized pursuant to an unconstitutional search due to the defective execution of the search warrant?
>
> Whether sufficient evidence existed to justify appellant's conviction on the charge of criminal conspiracy?

The first issue is whether the search warrant was based on probable cause. Instantly, the search of 6546 North 16th Street was conducted pursuant to a warrant that was issued upon a finding of probable cause by the issuing authority. Our Court has offered a detailed explanation of the standard of review of challenges to a finding of probable cause in these matters:

> In determining whether probable cause exists, Pennsylvania applies the"totality of the circumstances" test. Commonwealth v. Sharp, 683 A.2d 1219, 1223 (Pa.Super.

1996). The duty of this Court is to ensure that the magistrate had a "substantial basis for concluding that probable cause existed." Id.

An affidavit for a search warrant is to be tested by this Court with common sense and a realistic manner, and not subjected to overly technical interpretations; the magistrate's determination of probable cause is to be accorded great deference on review. The law is clear that before a search warrant may issue, facts supported by oath or affirmation must be presented to the issuing officer which will justify a finding of probable cause. For the warrant to be constitutionally valid, the issuing officer must conclude that probable cause exists at the time the warrant is issued. Such a conclusion may not be made arbitrarily and must be based on facts [that] are closely related in time to the date the warrant is issued.

Commonwealth v. Baker, 532

> Pa. 121, 126, 615 A.2d 23, 25 (1992) (citations and quotation marks omitted). Probable cause is based on a finding of probability, not a prima facie showing of criminal activity. Id. The duty of this Court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Id. The magistrate may not have considered any evidence outside the affidavit in determining whether probable cause has been established. Pa.R.Crim.P. Rule 2003(a), [renumbered 203(B) effective September 1, 2002].

Commonwealth v. Days, 718 A.2d 797, 800 (Pa.Super. 1998).

Appellant argues in his brief: "At best, appellant is observed entering and exiting a house on Cambridge Street at which drug sales are taking place. Such conduct does not constitute probable cause to search appellant's residence." However, "the law does not require

that [a search warrant affidavit] establish with absolute certainty that the object of the search will be found at the stated location, nor does it demand that the affidavit information preclude all possibility that the sought after article is not secreted in another location." Commonwealth v. Luton, 672 A.2d 819, 822 (Pa.Super. 1996) (citations omitted). The suppression court concluded that the finding of probable cause by the issuing authority was valid. We agree.

The affidavit here extensively detailed: (1) the affiant Bethea's expertise in the field of narcotics law enforcement, (2) criminal acts committed by appellant in the presence of the confidential informant, (3) the factual basis supporting the conclusion that the confidential informant was reliable, and (4) the independent corroboration of the factual details supplied by

the confidential informant through a five month police surveillance investigation. The totality of this information, when read in light of our standard of review, was clearly sufficient to establish probable cause for the issuance of the search warrant for appellant's residence. See: Commonwealth v. Davis, 595 A.2d 1216, 1220 (Pa.Super. 1991), appeal denied, 530 Pa. 630, 606 A.2d 900 (1992) (upholding warrant for appellant's home where the warrant indicated that the appellant had repeatedly returned home after conducting his drug business). Appellant next contends that the police violated his constitutional rights during the execution of the search warrant. Appellant's argument is based on the fact that the police forcibly entered the premises while executing the warrant. In reviewing this claim, we are

mindful that

> [o]ur scope of review in evaluating the trial court's refusal to suppress evidence is [to] determine whether the factual findings of the suppression court are supported by the record. When it is a defendant who has appealed, we must consider only the evidence of the prosecution and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. Assuming that there is support in the record, we are bound by the facts as are found and we may reverse the suppression court only if the legal conclusions drawn from those facts are in error. Thus, if sufficient evidence is of record to support the suppression court's ruling and that court has not misapplied the law, we will not substitute our credibility determination for that of the suppression court judge.

Commonwealth v. Days, 718 A.2d 797, 801 (Pa.Super. 1998), quoting Commonwealth v.

Marinelli, 547 Pa. 294, 315-316, 690 A.2d 203, 214 (1997), cert. denied, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998).

Fourth Amendment jurisprudence requires that police knock, announce their identity and purpose and wait a reasonable amount of time before forcibly entering the premises to execute a search warrant. Ker v. California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Commonwealth v. Means, 531 Pa. 504, 614 A.2d 220 (1992). The applicable legal standards which establish the manner of entry into the premises have been codified in Pa.R.Crim.P. 207, as follows:

> (A) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of his identity, authority and purpose to any occupant of the premises

> specified in the warrant, unless exigent circumstances require his immediate forcible entry.
>
> (B) Such officer shall await a response for a reasonable period of time after his announcement of identity, authority and purpose, unless exigent circumstances require his immediate forcible entry.
>
> (C) If the officer is not admitted after such reasonable period, he may forcibly enter the premises and may use as much physical force to effect entry therein as is necessary to execute the search.

Pa.R.Crim.P. 207.

The purpose of the "knock and announce" rule/ as articulated by the Pennsylvania Supreme Court in Commonwealth v. Morgan, 517 Pa. 93, 534 A.2d 1054 (1987) "is to prevent violence and physical injury to the police and occupants, to protect an occupant's privacy

expectation against unauthorized entry of persons unknown to him or her, and to prevent property damage resulting from forced entry." Id. at 97, 534 A.2d at 1056. It is also well established that even where the police comply with Rule 207 by knocking and announcing their identity and purpose, forcible entry remains impermissible if the occupants of the premises sought to be entered have not been provided with the opportunity to relinquish the premises voluntarily. Commonwealth v. Parsons, 570 A.2d 1328, 1331 (Pa.Super. 1990), citing Commonwealth v. DeMichel, 442 Pa. 553, 561, 277 A.2d 159, 163 (1971). The reasonableness of the manner of execution of a search warrant is to be determined on a case-by-case basis. Commonwealth v. McDonnell, 512 Pa. 172, 176, 516 A.2d 329, 330 (1986). In

determining whether police complied with the requirements of the "knock and announce" rule, the proper focus is on whether the record contained sufficient evidence for the trial court to have concluded that police reasonably believed that the occupants did not intend to surrender the premises peaceably or voluntarily, rather than the subjective analysis of what occupants of particular premises knew, and whether they thought police provided them with sufficient time to voluntarily relinquish premises. Commonwealth v. Parsons, supra, 570 A.2d at 1331-33. After thoroughly reviewing the record, we agree with the suppression court that the conduct of the officers was within constitutional bounds as they complied with the "knock and announce" rule. At the suppression hearing, testimony

demonstrated that the police knocked, loudly announced "police, search warrant," waited for a period of seven to ten seconds, and then knocked a second time, again announced their identity and purpose, and waited for an additional period of approximately fifteen to twenty seconds. The entry officer then hit the front door knob once with a battering ram, and the front door swung open and police entered. As Sergeant Powell testified, police entered after repeated knocking and announcing because it appeared that no one within the premises intended to respond or answer the door:

> Q: Officer, is that the usual procedure, for you to call out police two times before you would breach entry?
>
> A: Well, it's not so much procedure. Every situation is different. Sometimes you will knock

> and announce and yell police, and someone will respond from inside, hold on, I'm coming down, or wait, I'm coming down, and then you try to give them a reasonable amount of time to come down. Sometimes they say I'm coming down and you hear the toilet flush, so you know that is not what is going on at that point. Sometimes, someone will say, wait, I'm coming down and you'll hear running around. At this time, there was really no response. There was no noise, no response, nobody said wait, I'm coming down, at which time the teams made entry.

N.T. 8/21/00, p. 116. On this record, we agree with the trial court that the execution of the search warrant in this case was constitutional.

Lastly, appellant argues that the evidence presented at trial by the Commonwealth was insufficient to justify a verdict of criminal conspiracy. Specifically, appellant argues that

"[i]n the present case no evidence whatsoever existed to support a conviction based upon a criminal conspiracy between appellant and Henry Maiden."

To sustain a conviction for criminal conspiracy under the Pennsylvania Crimes Code, the Commonwealth must establish that the defendant had "(1) an intent to commit or aid in an unlawful act, (2) an agreement with a co-conspirator and (3) an overt act in furtherance of the conspiracy" Commonwealth v. Hatchin, 709 A.2d 405, 409 (Pa.Super. 1998), appeal denied, 556 Pa. 672, 727 A.2d 128 (1998). 18 Pa.C.S. § 903. As an explicit agreement to commit a crime can "seldom be proved and need not be, proof of a criminal partnership can be extracted from circumstances that attend its activities."

Commonwealth v. Davalos, 779 A.2d 1190, 1193 (Pa.Super. 2001). Therefore, a conspiracy may be inferred "where it is demonstrated that the relation, conduct, or circumstances of the parties, and the overt acts of the co-conspirators sufficiently prove the formation of a criminal confederation." Commonwealth v. Johnson, 719 A.2d 778, 785 (Pa.Super. 1998), appeal denied, 559 Pa. 689, 739 A.2d 1056 (1999) (citations omitted).

The evidence established that between October 29, 1998 and March 18, 1999, appellant and Maiden were observed regularly in the 1400 block of West Cambridge Street. Police observed Young and Maiden, together and separately, entering and exiting residences at 1433, 1434 and 1435 West Cambridge Street on October 30, 1998, January 20 and 21, 1999, February 8

and 9, 1999, and March 2, 4, and 18, and a corresponding increase in foot traffic at these residences during their presence. Crack cocaine found at both Maiden's and appellant's respective residences, was, in the opinion of a narcotics expert, possessed with intent to deliver.

Both appellant's and Maiden's criminal intent to deliver drugs was clearly established by their possession of large quantities of crack cocaine, drug paraphernalia, cash and weapons. Furthermore, their frequent visits to 1433, 1434, and 1435 West Cambridge Street, together and separately, during which time a surge in foot traffic in and out of these locations was observed, provided an ample basis upon which the court could find a conspiracy. Under these facts and circumstances, and given

our standard of review in evaluating a sufficiency challenge, which accords the benefit of all inferences to the Commonwealth as verdict winner, this claim must be rejected as meritless.

Having reviewed the contentions of appellant, and having found them to be without merit, we affirm the judgment of sentence imposed by the distinguished Judge Anthony J. DeFino.

Judgment of sentence affirmed.

IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PA: DEC.TERM, 1999
v. : NO.0843
DAVID YOUNG

OPINION

DeFINO, J OCTOBER 17, 2001

On January 11, 2001, the defendant was found guilty by this Court, sitting without a jury, of Possession of a Controlled Substance With Intent to Deliver, Knowingly and Intentionally Possessing a Controlled Substance, and Criminal Conspiracy. On May 15, 2001, the defendant was sentenced to a total period of incarceration of not less than seven (7) to fourteen (14) years at a state correctional institution. Thereafter the defendant filed a notice of appeal followed by a statement of matters complained of on appeal as directed by this Court. The Defendant

raises the following issues:

1. The trial Court erred in denying defendant's motion to suppress based upon:

a. Defective Search Warrant.

b. Violations of Knock and Announce Rule:

i. Failure to announce purpose

ii. Failure to wait sufficient amount of time prior to entering forcibly.

2. Insufficient Evidence to Support the Verdict.

The facts underlying the instant case concern an extensive undercover surveillance investigation by the narcotics squad. Said investigation stretched from 10/1/98 till 3/26/99 culminated in the preparation and execution of a thirty-three page search warrant confiscation of large quantities of drugs and

drug paraphernalia and the arrest of defendant. See N.T.1/09/01,1/10/01,1/11/01

1. MOTION TO SUPPRESS.

In his first issue the defendant claims that the warrant was not supported by probable cause. This Court after reviewing the entire warrant, in camera, found that under the four corners of the warrant more than probable cause exited for the issuance of said search warrant. Thus this claim must fail.

Next defendant claims of violations of the Knock and Announce rule. Specifically, he claims that the officers failed to adequately announce their presence and intentions. Then he claims that the officers forcibly entered the property before allowing a suitable period of time to elapse. This Court held an extensive hearing on these issues, and did extensive research on this

topic. After a thorough review of the facts, evidence, and law this Court concluded that none of the officers behavior was violative of the defendant's rights against unlawful and unreasonable searches. See N.T. 7/20/00, 8/20/00, and 9/7/00.

2. SUFFICIENCY OF THE EVIDENCE.

In reviewing the sufficiency of the evidence to support a conviction, the evidence must be viewed in the light most favorable to the Commonwealth, and the Commonwealth is entitled to all favorable inferences which may be drawn from the evidence. Commonwealth v. Hanes, 361 Pa.Super. 357, 361, 522 A.2d 622, 623-24 (1987). If a jury could have reasonably determined from the evidence adduced that all of the necessary elements of the crime were established beyond a reasonable doubt, then the

evidence will be deemed sufficient to support the verdict.

Commonwealth v. Gerulis, 420 Pa. Super. 266, 273, 616 A.2d 686, 689 (1992). In the instant case a review of the record reveals that in viewing the evidence in a light most favorable to the Commonwealth, the elements of the crimes convicted were proven beyond a reasonable doubt. See N.T. 1/09/00-1/11/00. Thus this claim must fail. For the aforementioned reasons the opinion of this Court should be affirmed.

CERTIFICATE OF SERVICE

I, GERALD A. STEIN, Esquire, hereby certifys that on this date three copies of the within Petition for Writ of Certiorari have been served, via first class mail, upon Hugh J. Burn, Jr., Esquire, Appeals Unit, Office of the District Attorney, 1421 Arch Street, Philadelphia, PA 19102.

Dated: April 4, 2002 _____

GERALD A. STEIN, Esquire